No. 80-503

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RICHARD A. KING, *et al.*,

Petitioners,

v.

ELDRED S. WALLACE, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

QUESTION PRESENTED

Whether the fourth amendment requires that police officers obtain search warrants naming the place to be searched before entering and searching the private homes

of third parties in an attempt to execute an arrest warrant for a person reasonably believed to be in those premises, absent consent of the homeowners or exigent circumstances.

COUNTERSTATEMENT OF THE CASE

This case arises out of the attempts of various Fairfax County, Virginia police officers to execute a capias (bench warrant) for the arrest of Susan Wallace Swain, the daughter of respondents, Eldred and Jeannie Wallace. The capias had been issued in Mrs. Swain's divorce suit as a result of her failure to obey a court order. In attempting to execute the warrant for the arrest of Mrs. Swain, the police conducted the two searches complained of by respondents. The following statement of the facts is based on a stipulation of the evidence entered on record and agreed to by the parties. For purposes of clarity, the two searches will be considered separately.

I. The Wallace Search

At about 8:30 p.m. on October 6, 1976, Eldred and Jeannie Wallace were watching television at their home in Fairfax County when they noticed several police cars pull up outside. Mr. Wallace, then a civil service employee of the Department of the Army, was fifty-six years old; his wife, Jeannie, a housewife, was fifty-five. The Wallaces went to their front door and were met there by Officers Robert Lawrence and Carla Helwig of the Fairfax County Police Department.

Officer Lawrence asked if the officers could come inside, and Mr. Wallace admitted them to the house. Lawrence announced to the couple that he had a capias for the

arrest of Susan Wallace Swain, their married daughter. He stated that the police had information indicating that Mrs. Swain was at the Wallace residence, and that he and Officer Helwig intended to search the house for her.

At the time of this incident, Susan Swain was married to James Swain, by whom she had one child. Mrs. Swain had not resided at her parents' home since her marriage several years earlier, although she visited them periodically. For some months prior to this incident, she had been in the process of obtaining a divorce from her husband in the Fairfax County Circuit Court. In the course of the divorce, Susan Swain had disobeyed a court order directing her to turn over her child to her husband for visitation. As a result, The Honorable Percy Thornton, Judge of the Fairfax County Circuit Court, issued a capias for her arrest on September 30, 1976.

A week later, on October 6, Officer Helwig was given this capias to execute by her supervisor at the Groveton Substation, Sgt. Riley Wilson. Sgt. Wilson told Helwig that the desk officer on duty had received a telephone call from James Swain, who alleged that Susan Swain was staying at the Wallace house. Sgt. Wilson did not speak to James Swain, nor is there any indication in the record that he or the desk officer questioned Mr. Swain concerning the basis for his allegations. Nevertheless, Wilson ordered Helwig to attempt to execute the arrest warrant at the Wallaces' home. After her conversation with Sgt. Wilson, Helwig took the capias and, along with Officer Lawrence, proceeded to the Wallace house.

The officers were met in front of the house by James Swain and his father, Harold. Mr. Swain told Lawrence that Susan's car was parked in the Wallace driveway and

that she was inside. Neither of the two officers questioned James Swain concerning his allegations. Nor did the officers run a radio license check on the automobile in the driveway, allegedly belonging to his wife, which would have revealed that the car was registered in the name of Eldred Wallace. The police officers went directly to the front door and were admitted in the manner described above.

While Lawrence and Helwig stood in his living room, Mr. Wallace told the officers that his daughter no longer lived with them, that she was not visiting their house then, and that they did not know her whereabouts. He asked the officers if they had a warrant to search his home. Lawrence responded that the police officers had authority, by virtue of the capias in their possession, to search the premises and that they did not need a search warrant to do so. Although objecting to the search, Mr. Wallace was unable and unwilling to interfere physically with the police. Officer Helwig thereupon searched the Wallace home, but she did not find Susan Swain. The officers then left.

The parties dispute whether or not Lawrence acted in a hostile, threatening manner toward the Wallaces; Mr. and Mrs. Wallace state that he did, and the officer denies it. Mr. and Mrs. Wallace both claim to have been upset and humiliated by the search of their home. The Wallaces also claim that the police left their emergency lights flashing during this incident, thereby adding to their embarrassment; the police deny this. Eldred Wallace testified at his deposition that he was forced to remain home from work on October 7, 1976 because the circumstances of the search aggravated an asthmatic condition from which he suffered

at the time.

At the time of the October 6, 1976 search, Robert Lawrence had been on the Fairfax County police force for approximately six years; Carla Helwig had been on the force for about a year. Both officers were familiar with the procedure for obtaining a search warrant. Officer Helwig stated at the time of her deposition, however, that although she frequently searched houses in Fairfax County, she had never once sought or obtained a search warrant before doing so.

The officers confirmed that a magistrate, whose function is to consider applications for arrest and search warrants, is on duty at the Groveton Substation twenty-four hours a day. Both Lawrence and Helwig acknowledged that there was ample time for either of them to have applied to the magistrate on duty for a search warrant prior to the search of the Wallace home, but that neither did so. Both officers were aware that the capias arose out of a domestic matter. They did not believe the October 6, 1976 search to be urgent or dangerous, nor did they consider themselves to be in hot pursuit of Susan Swain.

II. The DeBiase Search

On November 10, 1976, Mrs. Elizabeth DeBiase, a fifty-two year old housewife, was advised by her daughter that several police vehicles were gathered in front of the house and that the neighbors were standing outside watching. Mrs. DeBiase opened her front door to discover Officers William Woodill and Ralph Gardner of the Fairfax County Police Department standing outside. In front of the house were two police cruisers and a paddy wagon with, as Mrs. DeBiase claims, their lights flashing. The officers told

Mrs. DeBiase that they wanted to ask her some questions, and she admitted them to her living room. Woodill advised her that he and his partner had a capias for the arrest of Susan Swain, that the Groveton Substation had received information that Susan was there, and that the policemen wanted to search her home.

Mrs. DeBiase, a friend of Mrs. Wallace, was familiar by this time with the search of the Wallace home on October 6. She told the officers that they could not go through her house without a search warrant. Woodill responded that the capias gave them authority to search her residence, and the officers did so over Mrs. DeBiase's objection. Their search did not turn up Susan.

The officers were in the midst of noting Mrs. DeBiase's complaint when Sgt. Frank Scott, their supervisor at the Groveton Substation, walked in the front door. He and Mrs. DeBiase had a brief conversation, during which Mrs. DeBiase upbraided him for ordering the search of her home without obtaining a search warrant. Sgt. Scott reiterated that police officers in Fairfax County had the right to search her house under the authority of a capias. At her deposition, Mrs. DeBiase claimed to have been upset and humiliated by the search of her home; she stated also that she had sought medical treatment for the aggravation by this incident of her pre-existing stomach ulcer.

The search of the DeBiase residence had been set in motion earlier that afternoon by a telephone call from James Swain to the Groveton Substation desk officer. Mr. Swain, according to the officer on duty, was upset because the police were not attempting to arrest his wife. He left a return telephone number, which Sgt. Scott called after coming on duty. Sgt. Scott had information at this time,

by virtue of a note from another police officer attached to the capias itself, that there was reason to suspect that James Swain was using the Fairfax County police force to harass people in the County.

When Scott spoke to Mr. Swain, he questioned him concerning the allegations of harassment, but Swain denied the charge. The sergeant advised Mr. Swain that he would notify the Fairfax County Commonwealth's Attorney should he discover that Mr. Swain was misusing the police. Nevertheless, after the search of the DeBiase home, Sgt. Scott made no attempt to get in touch with the prosecutor, although his investigative report stated specifically that James Swain was using the police for harassment of private citizens.

Sgt. Scott at this time had never met Mr. Swain or any members of the DeBiase family. He did not question Swain concerning his allegations, nor did he attempt to corroborate those allegations. The sergeant had no information that Susan was armed or dangerous, and he knew that the capias related to a domestic dispute. None of his subordinates were in hot pursuit of Mrs. Swain. Sgt. Scott did not consider the apprehension of this woman to be an emergency requiring immediate action by the police; instead, as he testified, it was viewed as "a routine failure to appear matter."

At the time of this incident, Frank Scott had been on the Fairfax County police force for approximately fourteen years; William Woodill had been with the force for about three years. At his deposition, each officer stated that he had never applied for or obtained a search warrant during his service on the force. The defendant officers were aware that a magistrate is on duty at the Groveton

Substation twenty-four hours a day. They had been trained, moreover, in the procedure for obtaining search warrants. Sgt. Scott did not apply for a warrant for the search of the DeBiase residence, although by his own admission there was ample time for him to have done so.

The Fairfax County Police Department has educated its officers to perceive and act upon a distinction between searching for people, and searching for objects in a house. Consistent with that distinction, it is the stated policy of the Department for officers armed with a capias to search any residence for the person named therein if they have probable cause to believe that the suspect is in the premises, without the need to secure a search warrant for the house, even in the absence of exigent circumstances. The standard procedure followed by the Department is to use a capias or an arrest warrant to search premises when officers are seeking a person. The testimony of the defendant police officers demonstrates that members of the force followed that policy in this case.

ARGUMENT

The question presented here is being considered by the Court in another case, *Gary Keith Steagald* v. *United States of America*, In the Supreme Court of the United States, October Term, 1979, No. 79-6777. A writ of certiorari was issued in *Steagald* to review the judgment of the Fifth Circuit Court of Appeals on October 6, 1980, approximately one week after the filing of this petition. In light of this development, respondents do not oppose the issuance of a writ to review the judgment here. In a motion filed concurrently with this brief, respondents will further request that the Court consolidate this case with case No. 79-6777 for all further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted and this case should be consolidated with case No. 79-6777 for all further proceedings.

Respectfully submitted,

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